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No. 71-405

# In the Supreme Court of the United States

OCTOBER TERM, 1971

JOGUES EGAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The *en banc* opinion of the court of appeals and the panel opinion, reproduced in the Petition for a Writ of Certiorari filed by the Government in *United States* v. *Egan,* Oct. Term, 1971, No. 71–263, Appendices A and C, are not yet reported.

### JURISDICTION

The judgment and *en banc* opinion of the court of appeals were filed on May 28, 1971. The petition for a writ of certiorari was filed on August 20, 1971. The conditional cross petition for a writ of certiorari was filed on September 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



447–309—71

## QUESTIONS PRESENTED

1. Whether the notice given petitioner of the hearing on the immunity application and the conduct of the subsequent contempt citation were procedurally proper.

2. Whether the petitioner was entitled to refuse to answer questions put to her by the grand jury on the ground that the answers to these questions might uncover certain crimes not included in the statutory provisions dealing with immunity of witnesses.

3. Whether the government's use in this case of the transactional immunity provided in 18 U.S.C. 2514 was constitutional.

## STATUTES INVOLVED

18 U.S.C. 2514 (dealing with immunity of witnesses) and 18 U.S.C. 2516 (dealing with authorization for interception of wire or oral communications) are reproduced in Pet. App. B.

## STATEMENT

On January 14, 1971, petitioner Egan appeared, pursuant to a subpoena, before a grand jury sitting at Harrisburg, Pennsylvania, which was engaged in the investigation of alleged violations under certain criminal statutes, including 18 U.S.C. 1201, the kidnapping statute, and 18 U.S.C. 371, the conspiracy statute. The grand jury asked petitioner several questions at that time, which she refused to answer on various grounds, including her Fifth Amendment privilege against self-incrimination.

On the same day the United States Attorney for the Middle District of Pennsylvania filed an applica-

tion for an order granting immunity to petitioner and instructing her to testify pursuant to 18 U.S.C. 6003. Petitioner claimed that she could not constitutionally be compelled to testify under that provision since it did not protect her from prosecution. A continuance sought by petitioner was granted, and the hearing was continued to January 15, 1971, and then to January 25, 1971, at which time the court granted immunity to petitioner pursuant to 18 U.S.C. 6003, and ordered her to answer the questions propounded by the grand jury.

On January 26, 1971, the government, having been informed that petitioner would continue to claim her Fifth Amendment privilege, attempted to expedite the grand jury proceedings by applying for an order instructing the petitioner to testify pursuant to 18 U.S.C. 2514, which provides immunity additional to that provided by 18 U.S.C. 6003. The court granted petitioner full transactional immunity pursuant to Section 2514 and ordered her to answer the questions put by the grand jury.

Petitioner returned to the grand jury and continued to refuse to answer questions, relying, among other grounds, on the Fourth Amendment. She alleged that the information which led to her subpoena and which provided the basis for the questions was the result of illegal wiretapping and electronic surveillance. The government sought and obtained an order to show cause why she should not be held in contempt. At the contempt hearing petitioner persisted in her refusal. The court, after hearing additional argument, found the petitioner in civil contempt and committed

her to the custody of the United States Marshal for the Middle District of Pennsylvania for the life of the grand jury or until she responded to the questions put to her.

**ARGUMENT**

1. The notice which petitioner received as to the hearing on the immunity application was procedurally adequate. Although petitioner was given only fifteen minutes notice of the immunity hearing, several cases have upheld the practice of holding an immunity hearing shortly after a witness whose testimony the United States Attorney has determined to be "necessary to the public interest" has refused to answer questions propounded by a grand jury. *Russo* v. *United States*, No. 71-2046, C.A. 9, decided August 17, 1971; *United States* v. *Weinberg*, 439 F. 2d 743 (C.A. 9); *Licata* v. *United States*, 429 F. 2d 1177 (C.A. 9), vacated as moot, 400 U.S. 938; *In re Lazarus*, 276 F. Supp. 434 (C.D. Cal.); *In re Loughran*, 276 F. Supp. 393 (C.D. Cal.). In *Licata* v. *United States*, *supra*, the Ninth Circuit addressed itself directly to petitioner's contention and held that "Section 2514 suggests, and we conclude that issuance of such an order [granting immunity] is a ministerial act requiring neither notice nor a hearing."

> The U.S. Attorney's assertion that the testimony of a witness is "necessary to the public interest" must be accepted by the court to which the application is presented; Ullman v. United States, 350 U.S. 422 (1956); his representations concerning the offenses being investigated by the grand jury must likewise be accepted.

> Furthermore, no opportunity to exercise judicial discretion arises with respect to the Attorney General's approval of the application; he either assents or he doesn't assent. Thus the application tenders no issue, either factual or legal, for judicial decision. [429 F. 2d at 1179.]

Petitioner contends in her conditional cross petition (Pet. 7) that *Licata* is in direct conflict with *In re Bart*, 304 F.2d 631 (C.A. D.C.). The proceeding in *Bart*, however, involved a different immunity statute, 18 U.S.C. 3486, which the court of appeals read as requiring that the judge determine whether the offense under investigation involved "interference with or endangering the national security." Courts do not, as the above cited cases hold, have the power or function under 18 U.S.C. 2514 to inquire into the merits of the United States Attorney's determination, approved by the Attorney General, that testimony is "necessary to the public interest." See also *In re Shead*, 302 F. Supp. 569, 570 (N.D. Cal.) affirmed *sub nom. Carter* v. *United States*, 417 F. 2d 384 (C.A. 9), certiorari denied, 399 U.S. 935.

In *United States* v. *Weinberg*, *supra*, the court addressed itself to the contention which petitioner raises here that Rule 6(d) of the Federal Rules of Civil Procedure precludes the holding of hearings on motions immediately after notice thereof. The court pointed out what while Rule 6(d) provides for five days' notice prior to hearing of motions, it also provides that a different period may be fixed by the court. The district court in that case had denied a motion for a continuance and order that the Section

2514 proceeding be held almost immediately after the witnesses had refused to testify before the grand jury. On review of the contempt proceedings, the court of appeals approved of the trial court's expeditious handling of the situation, noting that "* * * such a proceeding is by its nature preliminary and summary * * *." (439 F.2d at 746.) In answer to the witnesses' claim of prejudice, the court stated that the witnesses "could not have been prejudiced by the grant of immunity because such a grant is for the benefit of the witness." (439 F.2d at 747.)

Petitioner also argues that she was denied due process at her contempt hearing because the district court did not grant her adequate notice and time to present defenses to the contempt citation. 28 U.S.C. Section 1826(a), however, authorizes the holding of a summary civil contempt proceeding in its provision that:

> Whenever a witness in any proceeding before * * * any court or grand jury * * * refuses without just cause shown to comply with an order of the court to testify * * * the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony * * *.

Several courts have upheld the application of this statutory provision in circumstances similar to those here. See, *e.g.*, *United States* v. *Weinberg* and *Licata* v. *United States*, *supra*; *In re Grand Jury Investi-*

*gation of Giancana*, 352 F. 2d 921 (C.A. 7), certiorari denied, 382 U.S. 959; *In re Lazarus*, 276 F. Supp. 434 (C.D. Cal.). As this Court explained in *Shillitani v. United States*, 384 U.S. 364, summary proceedings are proper in these circumstances because in such a proceeding the recalcitrant witness carries the keys to the jail in his own pocket. 384 U.S. at 368.

2. Petitioner's contention that the trial court erred in not making a determination prior to granting immunity that the questions would pertain solely to crimes within the scope of the statutes listed in the government's application is without merit. Although the vast ma-majority of the questions posed to petitioner, and the indictment [1] resulting from the grand jury proceedings, plainly related to the specified statutes, the judge was not obligated to examine the relevance of all the grand jury's questions. Indeed, such an inquiry would have interfered with the normal secrecy in which grand jury proceedings have traditionally been held. See *United States* v. *Harris*, 334 F. 2d 460, 462 (C.A. 2). As Judge Zirpoli stated in *In re Grand Jury Witnesses*, 322 F. Supp. 573, 577 (N.D. Cal.):

> The whole point of the investigation is to identify persons known to the respondents who may have engaged in [unlawful] activities * * *, and also to ascertain the details of their unlawful activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by

[1] The grand jury subsequently returned an indictment on Jan. 12, 1971, charging, *inter alia*, a conspiracy to kidnap a government official and the destruction of government property.

> the Court without knowledge of the facts before the Grand Jury would clearly constitute "undue interference of the Court." [2]

Allowance of a full range of questioning is not prejudicial to the witness. For once it is found that the grand jury is conducting an inquiry into a field where immunity, under Section 2514, pertains; then the witness obtains full immunity as to everything arising out of that inquiry, including acts which might constitute a violation of other statutes; thus no dilemma is presented to a witness if the questions are relevant to other violations. *Carter* v. *United States*, 417 F. 2d 384, 388 (C.A. 9), certiorari denied, 399 U.S. 935.[3] In any event, an examination of the in-

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[2] As stated in *In re Grand Jury Investigation of Giancana*, 352 F. 2d at 924 *supra*:

> We are unable to say that answers responsive to these questions might not logically be of assistance to the grand jury. That body may, by various avenues of interrogation, exercise its traditional functions in such a way as to elicit information about possible criminal violations. In seeking to establish the facts, a grand jury, in framing its questions to a witness, may adopt its form of approach to that most strategically suited to elicit the facts. Its form may be direct or indirect. If the latter, certain questions might be considered irrelevant if standing alone, when they are actually relevant as a part of a plan to elicit material information on a subject under consideration by the jury.

[3] No court has held that every question must relate to the particular violation under which immunity is granted. As stated in *Marcus* v. *United States*, 310 F. 2d 143, 147, n. 2 (C.A. 3), certiorari denied, 372 U.S. 944):

> Equally unfounded is appellant's assumption that his testimony must be limited to violations of that Act, and that the Court should not have directed him to answer

dictment returned by the grand jury in this case on January 12, 1971, reveals a close interrelationship among the alleged offenses investigated by it.

3. Petitioner also attacks the application to her of the transactional immunity provisions on the broad ground that transactional immunity statutes are unconstitutional. The constitutionality of transactional immunity statutes was long ago settled in *Brown* v. *Walker*, 161 U.S. 591, and need not be reconsidered by this Court now.

## CONCLUSION

It is respectfully submitted that the conditional cross petition for a writ of certiorari should be denied.

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*all* questions. A witness cannot control the scope of a grand jury investigation or challenge the relevancy of questions asked. Hale v. Henkel, 201 U.S. 43, 65 (1906); Nelson v. U.S., 201 U.S. 92 (1906) [emphasis in original].

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